HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 609 Environmental Contamination
SPONSOR(S): State Affairs Committee, Perez
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 702

FINAL HOUSE FLOOR ACTION: 117 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 609 passed the House on March 11, 2020, as CS/SB 702.

The Petroleum Restoration Program within the Department of Environmental Protection (DEP) establishes the requirements and procedures for cleaning up petroleum-contaminated land, as well as the circumstances under which the state will pay for the cleanup.

The bill allows an applicant for the Petroleum Cleanup Participation Program to provide a 25 percent cost savings by using a co-payment by the owner, operator, or responsible party or by demonstrating a cost savings to DEP through reduced rates by the proposed agency term contractor or the difference in cost associated with the site closure. The bill also removes the provision that allows applicants to reduce or eliminate costs associated with the limited contamination assessment report and the copayment costs if the applicant demonstrates an inability to pay.

The bill requires an applicant for the Advanced Cleanup Program to submit an agreement to continue to participate in the program upon the completion of the limited contamination assessment and finalization of the proposed course of action. The bill requires DEP to pay for the limited contamination assessment up to a certain amount.

In 2008, the Legislature passed the Florida Renewable Fuel Standard Act (act), which required that, beginning December 31, 2010, all gasoline sold or offered for sale in Florida by a terminal supplier, importer, blender, or wholesaler must be blended gasoline, defined as a mixture of 90 to 91 percent gasoline and 9 to 10 percent fuel ethanol or other alternative fuel, by volume. In 2013, the act was repealed.

The bill requires DEP to pay up to $10 million each fiscal year for the costs of labor and equipment to repair or replace petroleum storage systems that may have been damaged due to the storage of fuels blended with ethanol or biodiesel, or for preventive measures to reduce the potential for such damage.

The bill may have an indeterminate fiscal impact on the state and the private sector.

The bill was approved by the Governor on June 20, 2020, ch. 2020-56, L.O.F., and will become effective on July 1, 2020.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Petroleum Restoration Program

Background

Petroleum is stored in thousands of underground and aboveground storage tank systems throughout Florida. Releases of petroleum into the environment may occur as a result of accidental spills, storage tank system leaks, or poor maintenance practices. These discharges pose a significant threat to groundwater quality,[1] the source of 90 percent of Florida's drinking water.[2] The identification and cleanup of petroleum contamination is particularly challenging due to Florida's diverse geology, diverse water systems, and the complex dynamics between contaminants and the environment.

In 1983, Florida began enacting legislation to regulate underground and aboveground storage tank systems in an effort to protect Florida's groundwater from past and future petroleum releases.[3] The Department of Environmental Protection (DEP) regulates these storage tank systems.[4] Further, DEP may establish criteria for the prioritization, assessment and cleanup, and reimbursement for cleanup of areas contaminated by leaking underground petroleum storage tanks.[5] The Petroleum Restoration Program establishes the requirements and procedures for cleaning up contaminated land, as well as the circumstances under which the state will pay for the cleanup.[6]

To fund the cleanup of contaminated petroleum sites, the Legislature created the Inland Protection Trust Fund (IPTF).[7] The state levies an excise tax on each barrel of petroleum and petroleum products produced in or imported into the state to fund the IPTF.[8] The state determines the amount of the excise tax for each barrel based on a formula that is dependent upon the unobligated balance of the IPTF.[9] Each year, the Legislature deposits over $200 million from the excise tax into the IPTF.[10]

The owner of contaminated land or the person who caused the discharge is responsible for rehabilitating the land, unless the site owner can show that the contamination resulted from the activities of a previous owner or other third party (responsible party), who is then responsible.[11] Over the years, DEP has implemented different programs to provide state financial assistance to certain eligible site owners and responsible parties for site rehabilitation.[12] To receive rehabilitation funding assistance, a site must qualify for one of the following Petroleum Cleanup Eligibility Programs:

- Victim Abandoned Tank Restoration Program (ATRP), s. 376.305(6), F.S.
    - Innocent Petroleum Storage System Restoration Program (IVPSSRP), s. 376.30715, F.S.
    - Indigent ATRP, s. 376.305(6), F.S.

[1] U.S. Environmental Protection Agency, *Underground Storage Tanks (USTs),* available at https://www.epa.gov/ust (last visited Dec. 20, 2019).
[2] South Florida Water Management District, *Groundwater Modeling,* available at https://www.sfwmd.gov/science-data/gw-modeling (last visited Dec. 20, 2019).
[3] Chapter 83-310, Laws of Fla.
[4] Sections 376.30(3) and 376.303, F.S.
[5] Section 376.3071(5), F.S.
[6] DEP, *Petroleum Restoration Program,* available at https://floridadep.gov/Waste/Petroleum-Restoration (last visited Dec. 12, 2019).
[7] Section 376.3071(3)-(4), F.S.
[8] Sections 206.9935(3) and 376.3071(7), F.S.
[9] The amount of the excise tax per barrel is based on the following formula: 30 cents if the unobligated balance is between $100 million and $150 million; 60 cents if the unobligated balance is above $50 million, but below $100 million; and 80 cents if the unobligated balance is $50 million or less. Section 206.9935(3), F.S.
[10] DEP, *SOP – 1. Introduction,* available at https://floridadep.gov/waste/petroleum-restoration/content/sop-1-introduction (last visited Dec. 19, 2019).
[11] Section 376.308, F.S.
[12] Section 376.3071(12)(a), F.S.

- Early Detection Incentive Program (EDI), s. 376.3071(10), F.S.
- Petroleum Liability and Restoration Insurance Program (PLRIP), s. 376.3072, F.S.
- Petroleum Cleanup Participation Program (PCPP), s. 376.3071, F.S.

The ultimate goal for any contaminated site is for DEP to issue it a "No Further Action" (NFA) order. Upon discovery of a contaminant, DEP must be notified.[13] Once a responsible party completes a site assessment, it has three Risk Management Options (RMOs) available to perform site rehabilitation to achieve a NFA order.[14] Under the RMO options, the responsible party must either rehabilitate the site to the default cleanup target levels (CTLs)[15] or to alternative CTLs established through a risk assessment.

Under RMO I, DEP will issue a NFA order without institutional controls or without institutional and engineering controls if the exposure point concentration for all detected chemicals does not exceed the less stringent of their corresponding default residential CTLs, the background concentration, or the best achievable detection limits.[16] Under RMO II and RMO III, DEP will grant a NFA order, subject to institutional controls,[17] and if appropriate, engineering controls,[18] if the exposure point concentrations for all detected chemicals do not exceed default commercial/industrial CTLs or alternative CTLs adjusted for site-specific geologic or hydrogeologic conditions.[19] NFA orders usually result in reduced remediation costs and allow for contaminated site closures when remediation efforts have reached a diminishing return.

Petroleum Cleanup Participation Program

In 1996, the Legislature created PCPP to implement a cost-sharing cleanup program to provide rehabilitation funding assistance for all property contaminated by discharges of petroleum or petroleum products from a petroleum storage system that occurred before January 1, 1995. Petroleum discharges from sources other than a petroleum storage system cannot receive funding under PCPP.[20] Further, the following sites are not eligible for PCPP:

- Sites where DEP has been denied access;
- Sites owned or operated by the federal government;
- Sites identified by the United States Environmental Protection Agency to be on, or which qualify for listing on, the National Priorities List under Superfund; and
- Sites that are eligible under ATRP, EDI, or PLRIP.[21]

DEP ranks PCPP sites based on human health and safety risks.[22] When funds become available, DEP will notify the owner, operator, or person otherwise responsible for site rehabilitation (owner or responsible party) in writing, based on that priority ranking.[23] The owner or responsible party must then prepare and provide DEP with a limited contamination assessment report sufficient to determine the extent of the contamination and cleanup.[24] After approval from DEP, the owner or responsible party must enter into a PCPP agreement with DEP. The owner or responsible party may recommend a department term contractor to clean up the PCPP eligible discharge, but is not required to do so. Sites qualifying for the program are eligible for up to $400,000 of site rehabilitation funding.[25] DEP may

[13] Rule 62-780.210(1), F.A.C.
[14] Rule 62-780.680(1)-(3), F.A.C.
[15] Chapter 62-777, F.A.C.
[16] Rule 62-780.680(1), F.A.C.
[17] Institutional controls include restrictive covenants. For example, the closure may provide that the groundwater on the site may not be used.
[18] Engineering controls include requirements such as paving over an area with contaminated soil.
[19] Rule 62-780.680(2), F.A.C.
[20] Section 376.3071(13), F.S.
[21] Section 376.3071(13)(h), F.S.
[22] Rule 62-771.100(1), F.A.C.
[23] DEP, *Petroleum Cleanup Participation Program (PCPP),* available at https://floridadep.gov/waste/petroleum-restoration/content/petroleum-cleanup-participation-program-pcpp (last visited Dec. 13, 2019).
[24] Section 376.3071(13)(d), F.S.
[25] Section 376.3071(13)(b), F.S.

approve supplemental funding of up to $100,000 for additional remediation and monitoring at PCPP sites if such remediation and monitoring is necessary to achieve a NFA order.[26] The owner or responsible party must agree to pay a 25 percent copayment.[27] The copayment percentage may be reduced or eliminated if the owner or responsible party demonstrates an inability to pay.[28]

Advanced Cleanup
The Legislature created the Advanced Cleanup Program (Advanced Cleanup) in 1996 to allow eligible sites to receive state rehabilitation funding in advance of the site's priority ranking to encourage redevelopment and facilitate property transactions or public works projects.[29] To participate in Advanced Cleanup, a site must be eligible for restoration funding under EDI, PLRIP, ATRP, IVPSSRP, or PCPP.[30]

Applications for Advanced Cleanup must include a cost-sharing commitment in addition to the 25-percent-copayment requirement.[31] An applicant may demonstrate his or her cost-sharing commitment by proposing either a commitment to pay, a demonstrated cost savings to DEP, or both. The application must be accompanied by a $250 nonrefundable review fee, a limited contamination assessment report, a proposed course of action, and a site access agreement. The limited contamination assessment report must be sufficient to support the proposed course of action and to estimate the cost of the proposed course of action. Costs incurred related to conducting the limited contamination assessment report are not refundable from the IPTF.

DEP ranks the applications for Advanced Cleanup based on the percentage of cost-sharing commitment proposed by the applicant, with the highest ranking given to the applicant who proposes the highest percentage of cost sharing.

Effect of the Bill

PCPP
The bill requires the limited contamination assessment report, which must be submitted with the application for PCPP participation, to be sufficient to support the proposed course of action and estimate the cost of the proposed course of action.

The bill specifies that the site rehabilitation agreement between DEP and the owner or responsible party must include a 25 percent cost savings. This requirement may be met by a copayment by the owner or responsible party or a demonstrated cost savings to DEP through reduced rates by the proposed agency term contractor or the difference in cost associated with RMO I[32] closure versus RMO II[33] conditional closure, or both. The bill defines the term "RMO I" to mean a NFA closure without institutional controls or without institutional and engineering controls. The bill defines the term "RMO II" to mean a NFA closure where institutional controls and, if appropriate, engineering controls apply if the

[26] Section 376.3071(13)(c), F.S.
[27] Section 376.3071(13)(d), F.S.
[28] *Id*.
[29] Section 376.30713(1)(a), F.S.
[30] Section 376.3071(1)(d), F.S.
[31] *Id.*
[32] This option is used when concentrations of contaminants in soil, groundwater, and surface water are equal to or less than the residential CTLs and free product is not present. Concentrations of contaminants in soil must be less than leachability-based soil CTLs, or direct leachability testing results demonstrate that leachate concentrations do not exceed the appropriate groundwater CTLs. DEP, *SOP Site Manager Closure Guide,* available at https://floridadep.gov/waste/petroleum-restoration/content/sop-site-manager-closure-guide (last visited Dec. 18, 2019).
[33] Allows the use of alternative CTLs, which are higher than the residential CTLs. Institutional and, if necessary, engineering controls are required to ensure that contamination at the site poses no risk to people or the environment. An engineering control that prevents human exposure may be implemented, in which case the contaminant concentrations in the soil below the permanent cover or two or more feet below land surface may exceed the direct exposure soil CTLs. RMO II was developed specifically to streamline closures for small areas of contamination (less than ¼ acre). *Id.*

controls are protective of human health, public safety, and the environment. The bill specifies that such closure options apply subject to conditions in DEP rules and agreements.

The bill also eliminates the ability for the owner or responsible party to reduce or eliminate the copayment as well as costs associated with the limited contamination report if such party can demonstrate that they are financially unable to comply with the cost-share requirements.

Advanced Cleanup
The bill revises the requirements for participation in Advanced Cleanup by removing the requirement that the property owner or responsible party submit a limited contamination assessment report as part of the application. Instead, the applicant must submit an agreement to continue to participate in Advanced Cleanup, if selected, upon the completion of the limited contamination assessment and finalization of the proposed course of action. Upon acceptance of an application, the property owner or responsible party's selected agency term contractor must submit a scope of work for the limited contamination assessment to DEP. Once the scope of work is agreed to by DEP and the parties involved, DEP must issue a purchase order(s) for the limited contamination assessment for no more than $35,000 per purchase order. The limited contamination assessment report must be sufficient to support the proposed course of action and to estimate the cost of the proposed course of action.

Disbursement of Funds
The bill requires, rather than allows, DEP to disburse funds from the IPTF to the Fish and Wildlife Conservation Commission for the purpose of enforcement of the regulations governing pollution of ground and surface waters.

Renewable Fuel Regulations

Background

Federal Renewable Fuel Standards
Under the Energy Policy Act of 2005, the Environmental Protection Agency (EPA) is required to develop and implement regulations to ensure that transportation fuel sold in the U.S. contains a minimum volume of renewable fuel, through a Renewable Fuel Standard (RFS).[34] The RFS program requires the EPA to annually set the volumes of renewable fuel that will be used to replace or reduce the quantity of petroleum-based transportation fuel, heating oil, or jet fuel.[35] The RFS program requirements apply to refiners and importers of gasoline or diesel fuel. To achieve compliance, refiners and importers must provide blended fuels, which mix renewable fuels with transportation fuel, or must obtain credits, called Renewable Identification Numbers, to meet an EPA-specified Renewable Volume Obligation.[36]

Originally, the RFS program required 7.5 billion gallons of renewable fuel to be blended into gasoline by 2012.[37] However, the federal Energy Independence and Security Act of 2007 increased the renewable fuel standard minimum annual goal for renewable fuel use to 36 billion gallons by 2022.[38]

Florida Renewable Fuel Standard Act
In 2008, the Legislature passed the Florida Renewable Fuel Standard Act (act), which required that, beginning December 31, 2010, *all* gasoline sold or offered for sale in Florida by a terminal supplier, importer, blender, or wholesaler must be blended gasoline, defined as a mixture of 90 to 91 percent

[34] 42 U.S.C. § 13201 (2005).
[35] EPA, *Overview for Renewable Fuel Standard*, available at https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard (last visited Feb. 13, 2020).
[36] *Id*.
[37] *Id*.
[38] 42 U.S.C. § 17001 (2007).

gasoline and 9 to 10 percent fuel ethanol or other alternative fuel, by volume.[39] However, in 2013, the Legislature repealed the act.[40]

Compatibility Requirements for Storing Renewable Fuels
The EPA's underground storage tank (UST) regulations require petroleum tank systems to be compatible with the substances stored in them.[41] In an UST system, the regulated substances stored must not interact with the materials comprising the system in any way that would cause the system's performance to change. In the 2015 UST regulations, the EPA clarified those compatibility requirements, and owners storing or intending to store certain fuels were required to meet certain additional requirements, including demonstrating compatibility of the UST system.[42]

Each renewable fuel blend has unique chemical characteristics different from purely petroleum derived gasoline or diesel fuel. Those chemical characteristics may affect how the fuel interacts with UST systems. USTs contain many components made of different materials. If any of these materials are incompatible with the regulated substance stored and even temporarily lose their manufactured properties such as shape or flexibility, the UST system may fail to contain the regulated substance. This could result in a release to the environment and possibly a failure to detect the release. Incompatibility between fuels stored and UST system materials can result in equipment or components such as tanks, piping, gaskets, or seals becoming brittle, elongated, thinner, or swollen when compared with their condition when first installed.[43]

Effect of the Bill
The bill authorizes DEP to use funds from the IPTF for payments for the repair or replacement of, or other preventative measures for, storage tanks, piping, or system components. The bill specifies such costs may include equipment, excavation, electrical work, and site restoration.

The bill requires DEP to pay up to $10 million each fiscal year from the IPTF for the costs of labor and equipment to repair or replace petroleum storage systems that may have been damaged due to the storage of fuels blended with ethanol or biodiesel, or for preventive measures to reduce the potential for such damage.

The bill specifies that a petroleum storage system owner or operator may request payment from DEP for the repair or replacement of petroleum storage tanks, integral piping, or ancillary equipment that may have been damaged, or is subject to damage, by the storage of fuels blended with ethanol or biodiesel or for other preventive measures to ensure compatibility with ethanol or biodiesel.

The bill requires the request to include an affidavit from a petroleum storage system specialty contractor attesting to an opinion that the petroleum storage system may have been damaged as a result of the storage of fuel blended with ethanol or biodiesel or may not be compatible with fuels containing ethanol or biodiesel, or a combination of both. The affidavit must include a proposal from the specialty contractor for repair or replacement of the equipment, or for the implementation of other preventive measures to reduce the probability of damage. The bill further specifies that the affidavit must include the reasons that repair or other preventive measures are not technically or economically feasible or practical if the specialty contractor proposes replacement of any equipment.

The bill also requires the request to include copies of any inspection reports, including photographs, prepared by the specialty contractor or department or local program inspectors documenting the damage or potential for damage to the petroleum storage system; and a proposal from the specialty contractor showing the proposed scope of the repair, replacement, or other preventive measures,

[39] Chapter 2008-227, Laws of Fla.
[40] Chapter 2013-103, Laws of Fla.
[41] EPA, *Emerging Fuels and Underground Storage Tanks*, available at https://www.epa.gov/ust/emerging-fuels-and-underground-storage-tanks-usts (last visited Feb. 17, 2020).
[42] *Id.*
[43] *Id.*

including a detailed list of labor, equipment, and other associated costs. The proposal must also include provisions for any preventive measures needed to prevent a recurrence of the damage and the adoption of a maintenance plan.

For proposals to replace storage tanks or piping, the bill further requires the request to include a statement from a certified public accountant indicating the depreciated value of the tanks or piping proposed for replacement. The bill specifies that applications for such proposals must also include documentation of the age of the storage tank or piping. The bill further specifies that the depreciated value must be the maximum allowable replacement cost for the storage tank and piping, exclusive of labor costs, and tanks that are 20 years old or older are deemed to be fully depreciated and have no replacement value.

The bill requires DEP to review applications for completeness, accuracy, and the reasonableness of costs and scope of work. The bill further requires DEP to approve or deny the application, propose modification to the application, or request additional information within 30 days after receipt of an application.

If an application is approved, the bill requires DEP to issue a purchase order to the petroleum storage system owner or operator. The purchase order must:

- Reflect a payment due to the owner for the cost of the scope of work approved by DEP, less a deductible of 25 percent;
- State that a payment is not due to the owner pursuant to the purchase order until the scope of work authorized by DEP has been completed in substantial conformity with the purchase order; and
- Except for preventative maintenance contracts, specify that the work authorized in the purchase order must be substantially completed and paid for by the petroleum storage system owner or operator within 180 days after the date of the purchase order, or the purchase order is void.

The bill requires DEP, for preventative maintenance contracts, to develop a maintenance completion and payment schedule for approved applicants. The bill specifies that the failure of an owner or operator to meet scheduled payments invalidates the purchase order for all future payments due pursuant to the order.

The bill specifies that, with the exception of maintenance contracts, the applicant may request that DEP make payment following completion of the work authorized by DEP, in accordance with the terms of the purchase order. The request must include a sufficient demonstration that the work has been completed in substantial compliance with the purchase order and that the costs have been fully paid. Upon such a showing, DEP must issue the payment pursuant to the terms of the purchase order. For maintenance contracts, DEP must make periodic payments pursuant to the schedule specified in the purchase order upon satisfactory showing that maintenance work has been completed and costs have been paid by the owner or operator.

The bill authorizes DEP to develop forms to be used for application and payment procedures and allows DEP to request the assistance of the Department of Management Services or a third-party administrator to assist in the administration of the application and payment process. The bill specifies that any costs associated with the administration must be paid from the $10 million in IPTF funds required by the bill.

The bill specifies that facility owners or operators or petroleum storage system owners or operators must continue to comply with DEP rules regarding the maintenance, replacement, and repair of petroleum storage systems in order to prevent a release or discharge of pollutants.

The bill prohibits payments for proposal costs or costs related to preparation of the application and required documentation; certified public accountant costs; any costs in excess of the amount approved by DEP or which are not in substantial compliance with the purchase order; costs associated with

storage tanks, piping, or ancillary equipment that has previously been repaired or replaced for which costs have already been paid; facilities that are not in compliance with DEP storage tank rules, until the noncompliance issues have been resolved; or costs associated with damage to petroleum storage systems caused in whole or in part by causes other than the storage of fuels blended with ethanol or biodiesel.

The bill specifies that applications may be submitted on a first-come, first-served basis and DEP may not issue purchase orders unless funds remain for the current fiscal year.

The bill prohibits a petroleum storage system owner or operator from receiving more than $200,000 annually for equipment replacement, repair, or preventive measures at any single facility it owns or operates, or $500,000 annually in aggregate for all facilities owned or operated by the owner or operator.

The bill authorizes owners or operators that have incurred costs for repair, replacement, or other preventive measures during the period of July 1, 2015, through June 30, 2019, to apply to request payment for such costs from DEP. However, the bill prohibits DEP from disbursing payment for approved applications for such work until all purchase orders for previously approved applications have been paid and unless funds remain available for the fiscal year.

For new petroleum requirement registrations after July 1, 2020, the bill provides that DEP may only register equipment that meets applicable standards for compatibility for ethanol blends, biodiesel blends, and other alternative fuels that are likely to be stored in such systems.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may have an indeterminate positive fiscal impact on the state because the bill removes the provision that allowed a PCPP applicant to reduce or eliminate costs associated with the limited contamination assessment report and the copayment costs if the applicant demonstrated that he or she could not financially comply.

2. Expenditures:

   The bill may have an indeterminate negative fiscal impact on DEP because the bill requires DEP to pay for the limited contamination assessment for Advanced Cleanup applicants and for the repair or replacement of storage tanks, piping, or system components that could be affected by blended fuels. The IPTF receives an appropriation of over $100 million in the Petroleum Tanks Cleanup appropriation category each fiscal year. The fiscal impact of the bill can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate negative fiscal impact on the private sector because the bill provides flexibility to PCPP participants as such applicants can provide a cost savings to DEP by either

providing a copayment or demonstrating a cost savings in the form of reduced rates. The bill, however, removes the provision that allowed such applicants to reduce or eliminate costs associated with the limited contamination assessment report and the copayment costs if the applicant demonstrated that he or she could not financially comply. The bill will also reduce the amount of funds available for uses other than the repair or replacement of storage tanks, piping, or system components because the bill requires DEP to pay up to $10 million for such purpose each fiscal year.

The bill may have an indeterminate positive fiscal impact on participants in Advanced Cleanup as the bill requires DEP to pay for the limited contamination assessment. The bill may also have a positive fiscal impact on owners or operators who may now apply for the repair or replacement of storage tanks, piping, or system components.

D. FISCAL COMMENTS:

None.